

ESTTA Tracking number: **ESTTA24837**

Filing date: **02/01/2005**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Henry Thayer Company, d.b.a. Thayer's Natural Remedies		
Entity	Corporation	Citizenship	Delaware
Address	P.O. Box 56 Westport, CT 06881 UNITED STATES		

Attorney information	Derek H. Kiernan-Johnson Caplan and Earnest, LLC 1800 Broadway, Suite 200 Boulder, CO 80302 UNITED STATES dkiernan@celaw.com Phone:303.443.8010
-----------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------

Applicant Information

Application No	78395776	Publication date	01/11/2005
Opposition Filing Date	02/01/2005	Opposition Period Ends	02/10/2005
Applicant	Herbs, Etc., Inc. 1340 Rufina Circle Santa Fe, NM 87507 UNITED STATES		

Goods/Services Affected by Opposition

Class 005.

All goods and services in the class are opposed, namely: Herbal spray for soothing the throat

Attachments

notice of opposition.pdf (2 pages)
Exhibit 1.pdf (1 page)
Exhibit 2.pdf (1 page)
Exhibit 3.pdf (1 page)

Signature

/Derek H. Kiernan-Johnson/

Name

Derek H. Kiernan-Johnson

Date

02/01/2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 78-395,776

For the mark SINGER'S

Published in the Official Gazette on January 11, 2005

Henry Thayer Company, d.b.a. Thayer's Natural Remedies, *opposer*

v.

Herbs, Etc., Inc., *applicant*

NOTICE OF OPPOSITION

Because it would be damaged if the above mark were registered, opposer Henry Thayer Company, d.b.a. Thayer's Natural Remedies ("Thayer") opposes registration, and does so for the following reasons:

1. On April 2, 2004, Applicant Herbs, Etc., Inc. ("Herbs Etc") filed an intent-to-use application to register a word as a trademark on the principal register.
2. The word Herbs Etc seeks to register is "Singer's."
3. Herbs Etc seeks to register that word in Class 5 (pharmaceuticals), and lists the goods or services associated with that word as "Herbal spray for soothing the throat."
4. Herbs Etc's application was published for opposition on January 11, 2005.
5. Herbs Etc currently sells an herbal throat spray called "Singer's Saving Grace," a term for which Herbs Etc secured federal trademark registration on June 9, 1998. (Thayer does not contest or oppose the registration and use of this three-word phrase as a trademark).
6. Herbs Etc. markets its herbal throat spray to vocalists, that is, singers. (*See, e.g.,* <http://www.hbees.com/sisagr.html>).
7. Thayer also sells herbal throat sprays. *See* Exhibit 1, advertisement, "Dry Mouth Lozenges & Sprays: Instant Moisture for Singers," appearing in *Singer Magazine*, Issue 28, p.39 (2004).

8. Thayer also markets its herbal throat sprays and similar products to singers. *See* Exhibit 1; Exhibit 2, advertisement, “Prized by singers world-wide!,” appearing in *Delicious Living Magazine*, p.76 (September 2004).
9. Thayer uses the word “Singer’s” in a descriptive sense to inform its target market of singers that Thayer’s herbal throat sprays and similar products are directed to and beneficial to singers. *See* Exhibits 1, 2. Thayer has done so since 1847. *See* Exhibit 3, original art from 1847, “For Singers, For Speakers,” still used today on boxes of Thayer’s Soothing Slippery Elm throat lozenges.
10. Because the term “Singer’s” describes a class of consumers to whom an appreciable number of Herbs Etc.’s goods are directed (specifically, singers), the term “singer’s” is merely descriptive within the meaning of 15 U.S.C. 1052(e). *See, e.g. In re Camel Mfg. Co.*, 222 U.S.P.Q. 1031, 1032 (T.T.A.B. 1984); *Shaw-Barton, Inc. v. John Baumgarth Co.*, 313 F.2d 167, 168 (7th Cir. 1963).
11. Because Herbs Etc. and Thayer are competitors in the market of selling herbal throat sprays and similar product to singers, and because Thayer currently uses the term “Singer’s” descriptively to indicate that its products are designed for and beneficial to that target market, Thayer (and the singing public) would be damaged by permitting registration of the word “Singer’s” for an herbal throat spray or similar goods. 15 U.S.C. § 1063; *e.g. Plyboo Am. Inc. v. Smith & Fong Co.*, 51 U.S.P.Q.2d 1633, 1634, n.5 (T.T.A.B. 1999); *Binney & Smith, Inc. v. Magic Marker Indus., Inc.*, 222 U.S.P.Q. 1003, 1010 (T.T.A.B. 1984).
12. For these reasons, Thayer opposes registration of SN 78-395,776 and respectfully requests that Herbs Etc.’s application be rejected.

Submitted electronically on February 1, 2005, by:

/Derek H. Kiernan-Johnson/

Linnea M. Simons
Derek H. Kiernan-Johnson
Attorneys for opposer

CAPLAN AND EARNEST LLC
1800 Broadway, Suite 200
Boulder, Colorado 80302-5289
Phone Number: (303) 443-8010
Fax Number: (303) 440-3967

THAYERS

SLIPPERY ELM

LOZENGES for singers



SLIPPERY ELM LOZENGES in the following flavors:

- Two Trees Lozenges with Elm Bark and Maple Sugar
- Tangerine Lozenges with Rosehips
- Wild Cherry Lozenges
- Original Lozenges



SLIPPERY ELM LOZENGES
in the following flavors:

- Original
- Tangerine with Rosehips
- Wild Cherry



**SUGAR-FREE DIABETIC-SAFE
SLIPPERY ELM LOZENGES**

(Minimally sweetened with natural
Sorbitol causing no side effects)

in the following flavors:

- Wild Cherry
- Original

*As seen on the
singer episode of
Dr. Oz*

**DRY MOUTH
CITRUS & MENTHOL
SPRAYS**



**DRY MOUTH
CITRUS LOZENGES**



Available at your health food store

**"Slippery Elm -
the funny sounding herb with serious
significance for professional singers."**



Almost a century ago, in a small church in Cambridge, Massachusetts, it was discovered that an organic substance, Slippery Elm, was being used by members of the church choir to soothe, heal and protect their tired, red, sore throats and vocal chords after long Sunday morning church services.

Word of this natural remedy spread throughout the choirs of New England. Over time, the secret was passed down to opera, rock, country and contemporary singers, as well as the number one user group, professional voice teachers. Soon the general population began using Thayers Slippery Elm Lozenges to heal and soothe their sore throats and coughs.

Today, users of Thayers Slippery Elm Lozenges find other benefits in the products, such as relief from acid-reflux and calming of the stomach and bowel.

It's simple: use one before singing to coat
and protect the throat and vocal chords,
then one after to heal any abrasions.

THAYERS

DRY MOUTH LOZENGES & SPRAYS

Instant Moisture for Singers

Over 20,000,000 people suffer from Dry Mouth as a result of stress, medications, chemotherapy, radiation, diabetes, asthma, Lupus, Sjögren's Syndrome, smoking, aging and AIDS.

Thayers® Dry Mouth Lozenges & Sprays are all sugar-free, a necessity for people with dry mouth.



• SINCE 1847 •

Thayers®, America's oldest Slippery Elm company, began offering, over 100 years ago, its Native American natural formula for healing sore, dry throats and coughs. Recommended by doctors for generations, these natural remedies soothe and heal the membranes of the throat and mouth.

Natural Flavors Original, Cherry, Rosehips/Tangerine with Vitamin C, Maple

Indications Natural healing and soothing of sore, dry throats and mouths; and coughs

Other Benefit Digestive aid that soothes "Acid Reflux"

NEW! **Diabetic-Safe, Sugar-Free Slippery Elm Lozenges** (sweetener is sorbitol, derived from berries, cherries, plums and pears).

- Preservative-Free
- Homeopathic Compatible
- All-Vegetable
- Gluten-Free
- Sodium-Free
- Fat-Free
- Menthol-Free



Available at your health food store

Thayers • P.O. Box 56 • Westport, CT 06881 • www.thayers.com
Any questions? Please call 203 • 226 • 0940

TRADE MARK REG.

U.S. PAT. OFF.

FOR
SINGERS



FOR
SPEAKERS

THAYERS

These lozenges are not a confection or candy—they have a real medicinal value to soothe your tired throat to help relieve Coughs due to common colds; for Hoarseness—"Smokers' Throat."

Two lozenges, dissolved slowly in the mouth, produces a soothing, clinging film, so comforting to the mouth and throat. Use freely as required.